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Supreme Court of the United States

Filed Feb. 16, 1901.

October Term, 1900.

C. HOOD,
Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri,
Defendant in Error.

TERM NO. 179.
(NO. 17,601.)

C. J. LANTRY,
Plaintiff in Error,
vs.
T. B. WALLACE, as Receiver of the Missouri National Bank of Kansas City, in the State of Missouri,
Defendant in Error.

TERM NO. 180.
(NO. 17,602.)

BRIEF FOR PLAINTIFFS IN ERROR IN EACH OF THE ABOVE ENTITLED CASES.

C. N. STERRY,
EUGENE HAGEN,
I. E. LAMBERT,
Attorneys for Plaintiffs in Error.

DE MOSS BOWERS, Law Printer, 235 W. First St., Los Angeles. Phone Green 1863.

IN THE

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STATEMENT OF FACTS IN EACH OF THE ABOVE CASES.

These cases were each commenced at the same time in the United States Circuit Court for the District of Kansas by the defendant in error, as receiver, to recover the assessment ordered by the comptroller of the currency, against the shareholders of the Missouri National Bank, of Kansas City, Missouri, for an amount equal to $100 per share.

The petition in the case brought against C. Hood alleged him to be the owner of one hundred shares, the petition in the case against Lantry alleged him to be the owner of two hundred shares of the capital stock. In each case amended and supplemental answers, and cross-petitions were filed by the defendants. Each of these answers contained two separate and independent defenses, and also included a cross-petition to recover a judgment against the receiver for the amount paid to the bank for this stock at the time of its purchase by the plaintiffs in error; to each of these defenses and to each of the cross-petitions the receiver filed a general demurrer. These demurrers were, on hearing, severally sustained by the Circuit Court; no further amendments being made to the answers, judgment was finally rendered in the case against C. Hood, for the amount of the assessment claimed, to-wit: Ten Thousand Dollars ($10,000), with interest and costs, and in the case against the defendant C. J. Lantry, for the sum of Twenty Thousand Dollars ($20,000), with interest and costs.

Each of these cases were then taken upon a writ of error to the United States Circuit Court of Appeals, for the 8th circuit, and there, upon consideration, the judgment of the court below was affirmed in each case by a divided court. From these judgments of affirmance writs of error were taken to this court.

The facts stated in each of the two defenses and cross-petitions in each answer, to which the demurrers were sustained, are substantially as follows:

The Missouri National Bank of Kansas City, Missouri, was organized as a national bank in 1891, with a capital stock of $500,000, which apparently was all subscribed and paid for at the time of the organization. Early in July, 1893, this bank temporarily suspended payment. Upon its suspension the comptroller of the currency of the United States, after careful investigation into its affairs, determined that while the bank was in a sound financial condition, it should reduce its capital stock to $250,000, and that upon such reduction it would be permitted to continue its business

as a national bank. The bank immediately reduced its capital stock to the amount required by the comptroller, and on July 26, 1893, the comptroller issued two public bulletins as follows:

"This bank (referring to the Missouri National Bank of Kansas City) suspended on the 17th inst. because of a run on the part of its depositors. There was nothing in its condition to warrant this run or occasion suspicion as to its solvency. It seems to have been prudently managed and its resources are unusually free from items of questionable value, there being no bad debts. The bank is solvent and should be permitted to resume."

"The Missouri National Bank of Kansas City, Missouri, having complied with the conditions imposed by the Comptroller of the Currency, and its capital stock being unimpaired, has this day been permitted to reopen its doors for business. The bank opens with plenty of money on hand, and is wholly solvent and safe."

The bank continued in business at Kansas City from July 26, 1893, until December 3, 1896, when it was closed by order of the comptroller, and it and its business placed in the hands of the defendant in error, as receiver.

From the time of its original organization, until it was finally placed in the hands of the receiver, in December, 1896, the bank was, as a matter of fact, absolutely insolvent, and in a wretched financial condition. Little or none of its capital stock (either as it was originally issued, or as it was left when it was reduced), was ever fully paid for, except by worthless and fictitious notes.

Prior to April 18th, 1896, the bank, through its president and cashier, sought to induce each of the plaintiffs in error (who were citizens of Kansas) to become connected with the bank, by the purchase of some of its capital stock. At the time of the negotiations with each of the plaintiffs in error, and at the time of the issuance of the certificates of stock to them, hereinafter set out, the bank was actually in an extremely bad condition, being utterly and hopelessly insolvent, on account of various reasons, including the lack of full payment in cash for its capital stock (all of which had been issued), bad loans, the withdrawal of money on fictitious notes, and other paper, and on account of other reasons, set forth

in the answers. From the commencement of its organization up to late in the fall of 1896, the officers of the bank, had so manipulated its books, and assets, as to be able to successfully conceal its actual insolvent condition from every one, including the comptroller, and his examiners.

While the bank was in this condition, the plaintiffs in error, were induced to make an investigation into its affairs, by the false and fraudulent representations of its officers, as to its perfectly solvent condition, with the view of becoming connected with it, through the purchase of some of its capital stock; they made the most careful and searching investigation, as to the actual condition of the bank, that it was possible for people situated as they were, to make.

In this examination they found, not only the very favorable reports of the bank examiners, made from time to time, but also the certificates of character, and good standing, issued by the comptroller upon the re-opening of the bank on the 26th of July, 1893, as above set out. The plaintiffs in error employed to make this examination two expert bank examiners. These examiners were deceived, as had been the government examiners, and as finally were these plaintiffs in error, through the false and fraudulent representations of the president and cashier, as to its solvency, the character of its bills receivable and other resources, and as to the extent and character of its liabilities, and the false and fraudulent concealment of the facts, made by the manner in which the books were kept, and by the fictitious and forged bills receivable, and other fraudulent practices of these officers and others set out in detail in these answers. At the very beginning of these negotiations, and from that time on, the president of the bank made to the plaintiffs in error, and to each of them, fraudulent and false representations, as to the condition of the bank, its resources and liabilities; representations that induced the plaintiffs in error, and each of them, to believe that the bank was perfectly solvent, and in the splendid condition that the

comptroller believed it to be in when he issued to the public his bulletins above set out. The records of the bank at that time disclosed that the average daily deposits amounted to $1,500,000, and that its loans, in the shape of bills receivable, averaged about $1,300,000. While each of the plaintiffs in error believed and relied upon the false and fraudulent representations of the president and cashier, they left nothing undone, that was possible for men situated as they were to do to fully acquaint themselves with the actual condition of the bank, before making the investment.

Prior to these negotiations certain stockholders of the bank, induced the bank, to purchase their stock from them, under threat to throw the stock, they wished to sell, on the market at such prices, as would create exposure of the actual condition of the bank. The bank, under these threats, during the time referred to, attempted to purchase about 800, of its outstanding shares of capital stock, and paid to the stockholders, holding the same, the prices asked, either in cash belonging to the bank, or by surrender of notes given by these stockholders, in payment of the stock sought to be purchased, or by cash and by surrender of notes, as the case might be. Each of the persons engaged in these transactions, knew that the bank was the real, actual attempted purchaser, of the stock, and that its funds, and its assets were being used in payment for the stock thus attempted to be purchased. In order to conceal the transaction, from the knowledge of the government, and everyone else the certificates for this capital stock, held by the persons of whom these attempted purchases were made, were either endorsed by such persons in blank, or assigned to the name of some employe, of the bank, and then delivered to the bank, by the persons attempting to sell. The bank, upon receipt of the certificates, would substitute the worthless notes, of insolvent employes of the bank, for the cash paid, or assets used, by the bank in such attempted purchase. None of this stock, so attempted to be purchased, was taken, or purchased, or procured by the bank, to prevent any loss or losses, upon any debt or debts, previously contracted in good faith, or

purchased in any way authorized by law, but was attempted to be purchased by the bank, with its funds, or assets, for the sole purpose of preventing such stock from being sold in open market, and to prevent the owners of it from making an investigation into the actual condition of the bank. None of the parties in whose names the certificates for the capital stock attempted to be purchased were assigned ever paid anything for the stock, neither did they, or any of them, ever intend to pay anything for the stock, or to pay any of the notes, given to the bank, to replace its funds, used in the purchase of the stock, because it was agreed between them and the executive officers of the bank, that they should hold the stock in trust for the bank, and for its sole use and benefit. When the plaintiffs in error finally determined to purchase stock of the bank, they were informed by the president of it, that the bank, held some of its own stock, taken by the bank, from debtors to prevent loss on debts, previously contracted in good faith, and that the officers of the bank, could purchase some more from friendly stockholders, who were anxious to have plaintiffs in error become stockholders in the bank. Hood thereupon, about April 18, 1896, agreed to purchase one hundred shares of this stock from the bank at par value, to-wit: $100 per share, and Lantry agreed to purchase from the bank two hundred shares of the stock at par value of $100 per share; Hood paid to the bank $10,000 in cash; Lantry paid to the bank $20,000 in cash, and each received certificates, for the number of shares of the capital stock, alleged in the respective petitions filed in the court below by the receiver, to be owned by them.

From the time the certificates of stock were issued to these plaintiffs in error and up to the time the bank went into the hands of a receiver, nothing occurred in the management of the bank, to arouse the suspicion of the plaintiffs in error, nor did they suspect anything, until the bank was actually taken possession of by the receiver on December 3, 1896. At that time the books, containing the history of the bank, and the bank's affairs, were turned over to the receiver, and *plaintiffs in error were severally denied access to*

them. They made persistent efforts, to secure all information possible about the bank's condition after the receiver was appointed, but were prevented from doing so by the receiver absolutely refusing and denying such request (Transcript p. 10), sometimes giving as an excuse assurances that the bank was solvent and would pay its debts. Not satisfied with these refusals made to them by the receiver, they made appeals to the comptroller, to permit them to investigate and ascertain the actual condition of the bank, such permission was finally granted them, about the first day of September, 1897. They at once procured the services of an expert bank examiner, who secured for them, a history of the bank, as far as it could well be done. As soon as this report was made to them by their expert, *they became aware for the first time* of the frauds that had been perpetrated upon them, and that the bank had been hopelessly insolvent since its suspension in 1893, if not from the beginning.

Immediately upon learning this, they tendered their stock back to the receiver, and demanded the return of their money paid for it to the bank or an allowance of their several claims therefor. It will thus be seen, that they had made the most careful and prudent investigation of the bank's affairs, before they attempted to purchase any stock, and when it went into the hands of a receiver, made every effort in their power, to ascertain its actual condition, and that, as soon as they became aware of the condition of the bank at the time of their purchase, they at once tendered the stock back, and rescinded the contract of purchase. The character of the frauds finally discovered, were not those, such as occur between parties, who deal with each other at arm's length, but were frauds, that had been so adroitly concealed, and covered up, that they had escaped the detection for years, of directors, stockholders, depositors, creditors—and even the vigilance, of one of the ablest comptrollers of the currency that had ever occupied that office, together with his large force of expert bank examiners, upon whom was conferred by law, not only ample power, to make full investigation, but the ab-

solute duty of guardianship over banks, like this one, for the purpose of detection of such frauds. Not only did these frauds escape the detection of the comptroller's office, but that very office, had placed a barrier in the way of their detection, by certifying to the world, that the bank was in a healthy, and prosperous condition, at a time when it was in truth rotten. After the bank went into the hands of a receiver, these frauds were not brought to light, and made known to the world, by the only person, who was clothed with the power, and charged with the duty to do so, but it was left for these defendants to secure, after many efforts, permission from the comptroller's office to investigate, and thereby learn, for the first time that which should have been disclosed willingly by the receiver to everyone interested.

On August 30, 1897, prior to obtaining permission to investigate, and while no one unless it was the comptroller, his receiver and the officers of the bank, were aware of the facts stated, the comptroller of the currency ordered an assessment of $100 per share against each shareholder. Each of the plaintiffs in error refused to pay this assessment, pending the investigation they were engaged in making, when notified.

The answer setting out in detail the facts above stated is found on pages 5 to 16 of the record in case numbered 17,602 (term No. 180), and pages 5 to 16, in case numbered 17,601 (term No. 179).

There is in each case, practically three main questions presented by the sustaining of the demurrers in the court below, and the affirmance of its ruling, by the Circuit Court of Appeals, which are as follows:

1st. Did the certificates issued by the bank to the plaintiffs in error make the plaintiffs in error shareholders of the bank liable to the assessment ordered?

2nd. Did these plaintiffs in error under the admitted facts have the right to rescind their contract of purchase of this stock at the time when they attempted to do so, and relieve themselves from the liability of the assessment ordered?

3rd. Had the plaintiffs in error the right to present their claims against the receiver, for the money paid to the bank at the time of their attempted purchase of this stock in a cross-petition filed in these causes of action commenced by the receiver to recover these assessments?

ASSIGNMENT OF ERRORS IN CASE NO. 17,601.

(Title of cause omitted.)

1st. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant therein, C. Hood.

2nd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and set forth in the amended and substituted answer of defendant therein, C. Hood.

3rd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in favor of plaintiff, T. B. Wallsce, as such receiver, against the defendant, C. Hood, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. Hood.

4th. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

Wherefore, the defendant, C. Hood, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the rendition of such judgment.

ASSIGNMENT OF ERRORS IN CASE NO. 17,602.

(Title of cause omitted.)

1st. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as receiver, to the first defense contained in the amended and substituted answer of defendant therein, C. J. Lantry.

2nd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the second defense stated and set forth in the amended and substituted answer of defendant therein, C. J. Lantry.

3rd. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in favor of plaintiff, T. B. Wallace, as such receiver, against the defendant, C. J. Lantry, upon the sustaining of said demurrer to the defenses contained in said amended and substituted answer of defendant, C. J. Lantry.

4th. That the United States Circuit Court of Appeals erred in sustaining and affirming the judgment of the United States Circuit Court in its ruling sustaining the demurrer of the plaintiff, T. B. Wallace, as such receiver, to the cross-petition in the answer in said cause contained.

Wherefore, the defendant, C. J. Lantry, prays that the judgment of said court heretofore rendered against him be set aside and held for naught, and that he be restored to all things which he has lost by the rendition of such judgment.

POINTS AND AUTHORITIES.

FIRST POINT.

The Circuit Court erred, in sustaining the demurrer to the second defense, in each answer, as the facts admitted by the demurrer in each of these defenses clearly established the proposition, that neither one of the plaintiffs in error, were shareholders of the Missouri National Bank, at the time of the levy, of the assessments, sought to be collected in these actions.

I.

We briefly re-state the facts upon which this defense, in each case, is based:

The bank, having all of its capital stock outstanding, attempted, through its officers, to purchase 800 shares of such stock, from some of its shareholders, to prevent a threatened exposure, of its actual insolvent condition, by the parties holding such shares of stock. To carry out this scheme, the officers of the bank, took of its assets, a sufficient amount to pay for the purchase, of these 800 shares, to the holders, the prices agreed upon; and paying for the same, had the stock certificates, which had been issued therefor transferred, by the actual owners of these certificates and the stock, represented by such certificates either directly to the bank, or to some of its employes, to hold in trust for the bank. All parties to this transaction, knew that the bank was using its assets, to make this purchase, for the purpose stated, and for no other purpose, and that such purchase was being made for the bank. These transactions, between the bank and its shareholders, were

bald, open violations of Section 5201 of the Revised Statutes of the United States, to the knowledge of all concerned. Upon receiving these certificates from its shareholders, who owned them, the bank, cancelled a sufficient number of them, to enable it to deliver, without an apparent over-issue, a certificate to plaintiff in error Hood for 100 shares, and a certificate to plaintiff in error Lantry for 200 shares (see printed Transcript, case No. 17,601, pages 12 to 15, and case No. 17,602, pages 12 to 15).

II.

That this attempted purchase of a portion of its own capital stock by the bank for the purpose admitted in violation of the statute, was *void* and not merely *voidable*, seems no longer to be an open question in this court, under the principles determined by it in the cases of:

Johnston v. Taffin, 103 U. S. 800;
California Bank v. Kennedy, 167 U. S., 362;
First National Bank of Concord v. Hawkins, 174 U. S., 364.

On the 28th of October, 1899, the Court below in following the decision of this Court, in California Bank v. Kennedy, *supra*, in the case of Schofield v. Goodrich Bros. Banking Co. (98 Fed. 271), held that:

"The purchase by a corporation, only empowered by its charter to transact a banking business, of the stock of another corporation, as an investment, and not as security or in payment of a debt, is *ultra vires* and void, and cannot be validated by estoppel. Hence such a corporation cannot be held liable for an assessment as a stockholder of a national bank, where it purchased the stock as an investment, although it retained such stock until the national bank became insolvent, and received dividends thereon."

Notwithstanding this decision, and in direct opposition to the principles determined by it, the court below, two days after it was rendered, in determining the case at bar, held in substance: That a national bank, having attempted, in direct violation of the pro-

visions of Section 5201 of the Revised Statutes, to purchase some of its own outstanding capital stock, could, by selling the same, to an innocent purchaser, under fraudulent representations, create by such a transaction, as against such innocent purchaser, an estoppel, which would prevent such purchaser, from denying the fact, that the bank had acquired title to this stock, sufficient to transfer it, provided the bank through such sale, was enabled to replace that portion of its assets, used in the purchase of the stock, by the money fraudulently obtained from the purchaser. It must be admitted that one of these decisions of the court below is wrong.

III.

The certificates, which were transferred to the bank, upon its attempted purchase of these 800 shares of stock, did not vest in the bank, either the possession of the stock, or the title to a single one of the shares, represented by such certificates.

The certificates, *not being the stock itself*, but merely evidence of the ownership of the stock represented by them, could not, upon delivery to the bank, in direct violation of the provisions of the statute, divest the people transferring them, of their title to the stock, evidenced by such certificates, and invest the bank with title.

Mr. Cook, in his work on Stock, Stockholders and Corporation Law (2nd ed.), paragraph 10, states the legal character of certificates of stock in corporations as follows:

"Certificate of Stock:—A certificate of stock is, from one point of view, a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the shareholder in the corporate property and franchises; it operates to transfer nothing from the corporation to the shareholder, but merely affords to the latter evidence of his rights. It should be clearly apprehended that the certificate is not the stock, but merely written evidence of the ownership of shares. Accordingly, it follows that shares have no 'ear marks'—that one share cannot be distinguished from another share—but that it is only the certificates which are distinguishable one from the other

by their numbers and in other ways. The certificate, therefore, has value in itself only as evidence, and apart from the shares which it represents, it is utterly worthless. And even as evidence, it is not in every case essential; it is merely a convenient voucher, which the shareholder has a right to receive if he asks for it. One element of its value to the shareholder is that it is prima facie evidence of his title."

Judge Thompson, in his recent work on Corporations, volume 2, section 2348, states the proposition as follows:

(The italics are ours.)

"And, first, it is to be observed that such a certificate is merely the paper representative of an incorporeal right, and that it stands on a similar footing to that of other muniments of title. It is not in itself *property*, but is merely the *symbol* or paper evidence of property. Hence, the proprietary right may exist without the certificate. Numerous cases accordingly hold that a person may acquire the rights and incur the liabilities of a shareholder, both to the corporation and to its creditors, although no certificate has, in fact been issued. Corporate shares have also been classed as 'securities.' And although they may be thus designated within the meaning of particular statutes, yet it is plain that they are not securities in the proper sense of the word. 'Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation in which he is a member.' The following further observations in the same line of thought were made by Mr. Justice Crockett: 'If a firm doing business as an ordinary partnership issue certificates to each of its members, specifying the interests of the respective co-partners, such certificates would have no intrinsic value, except as evidence of the *quantum* of interest of each co-partner. The joint interest of the co-partner in the property and business of the firm is the substance of the existence of which the certificate is but the evidence. If, for example, there be three co-partners, each owning an undivided interest of one-third, there is no appreciable difference between the respective interests. They are in all respects precisely similar, and each several interest is an exact duplicate of the others. The same principle is applicable to corporations. The holder of ten shares of stock stands precisely upon the same footing as any other holder of ten shares. Their interests are precisely similar and of the same value, and each holds but an undivided interest in the common property.' From the principle that the certificate is not the property itself, but merely the muniment of title, it has been held

that the duties, privileges and responsibilities of the holder of it cannot be divested by the mere act of writing across the face of it the word 'cancelled,' and returning it to the secretary of the company. As a certificate is not necessary to make one a shareholder, *so the surrender of it to the company does not necessarily make the holder of it cease to be a shareholder.*"

That this court is in full accord with the doctrine of the text quoted, is shown by the following quotation from Justice Bradley's opinion in the case of Bank v. Eaton, (141 U. S., 227):

"A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself."

See also:

Hammond & Co. v. Hastings, 134 U. S., 401;

Johnston v. Laflin, 103 U. S., 800;

National Bank v. Watsontown Bank, 105 U. S. 223.

The case of Burrows v. Niblack, decided by the Circuit Court of Appeals of the 7th circuit (84 Fed. 111), is precisely in point. This case was an action brought by the receiver of the Chemical National Bank of Chicago, to recover from Burrows $10,000 paid to him, by that bank for a hundred shares of its own outstanding capital stock, attempted to be purchased from Burrows, while it was a going concern. We quote from the opinion in this case, illustrative of the point in question, as follows:

(The italics are ours.)

"The principal objections urged are: (1) That the validity of the purchase by the bank of its own stock can be questioned only by the government; (2) That the alleged liability of the bank for the return of the money can be enforced only in a court of equity; and, (3) That a tender back of the shares of stock purchased, was essential to the right of recovery of the price paid. The first objection is based upon that line of decisions of which illustrations are found in Bank v. Matthews, 98 U. S., 621; Bank v. Whitney, 103 U. S., 99; and Thompson v. Bank, 146 U. S., 240, 13 Sup. Ct., 66; but the present case, as we think, is governed rather by the principles declared in McCormick v. Bank, 165 U. S., 538; 17 Sup. Ct., 433; and Bank v. Kennedy, 167 U. S., 362; 17 Sup. Ct., 831, where the line of cases mentioned is distinguished. The transaction

here in question was not a purchase made for the purpose of preventing, or which was necessary to prevent, loss upon a debt previously contracted, but as set forth, it was a bald purchase by the bank of its own stock for cash, and necessarily involved for the time being a reduction *pro tanto* of the corporate stock. Even if it were not forbidden by the statute, the transaction would be inconsistent with public policy and with established principles of law. The suggestion that a reduction of stock by a national bank may be lawfully made under section 5143 of the revised statutes is irrelevant because it is not shown, and without proof it is not to be presumed, even if it were conceivably possible, that this transaction could have been justified under the provisions of that section. The purchase was outside of and beyond the powers of the bank, and therefore, as a corporate act, was void from the beginning; and, while it appears from the agreement that the certificates of stock were endorsed in blank and delivered to the president of the bank, *the latter did not thereby acquire, nor the plaintiff in error part with, title to the stock.* The money having been unlawfully paid out, the bank had an immediate right of action to recover it in an action of assumpsit. *It was not necessary to go into equity nor to offer a return of stock.*"

This court has practically held, that in such case it is not necessary to make any tender or demand.

Pence v. Langdon, 99 U. S., 578.

IV.

The shareholders, from whom these 800 shares of the bank's capital stock, was attempted to be purchased by the bank, remained, after the transfer of the certificates to the bank, or its employes, just as much, the owners of the stock, attempted to be transferred, as they were prior to such attempted transfer.

The persons attempting to sell this stock to the bank were the persons, whom the receiver, should have called upon to pay these assessments, instead of calling upon the plaintiffs in error. It has been constantly held, by the Federal Courts (including this court) that the real owner, of the shares of capital stock, of an insolvent corporation, is the party who should be held liable, for the assessment, where an assessment of stockholders for the benefit of creditors is authorized.

Pauly v. State Loan and Trust Co., 165 U. S. 606, and cases therein cited;
Anderson v. Warehouse Co., 111 U. S., 479;
Johnston v. Laflin, *supra*;
Whitney v. Butler, 118 U. S., 655;
Stuart v. Hayden, 169 U. S., 1;

V.

The two certificates issued to Hood, and Lantry, purporting to convey one, and two hundred, shares of the capital stock of this bank, were each for an actual over-issue of stock, and hence did not, make either Hood, or Lantry, a shareholder in this bank. In support of this proposition, we quote from the text of Cook on Stockholders, etc. (4th Ed., Par. 292):

"By over-issued stock is to be understood stock issued in excess of the amount limited and prescribed by the act of incorporation. Certificates of stock issued in excess of the certificates that represent the full authorized capital stock of the corporation represents over-issued stock. Such stock is spurious and wholly void. This is the settled law, and it prevails equally whether the over-issue is the result of accident or mistake, or want of knowledge of the law, or is due to fraud and intentional wrong-doing. The *animus* or intent of the parties to the over-issue is not material. Over-issued stock, no matter how over-issued, represents nothing, and is wholly and entirely valueless and void. So rigid and well established is this rule that not even a *bona fide* holder of such stock can give to it any validity or vitality."

The leading case upon this subject is that of New York, etc., R. R. Co. v. Schuyler, 34 N. Y., 30, which fully supports the text above quoted.

If these certificates, represented nothing but over-issued stock, then under the decision of this court, (Scovill v. Thayer, 105 U. S. 143), neither Hood, or Lantry, acquired any rights, as stockholders in this bank, or assumed any liability, for the assessments in controversy. We believe that the rule laid down by this court

in Scovill v. Thayer, has now become the settled doctrine of all the courts.

See the decision of the court, below, in the case of Lared Improvement Co. et al. v. Stevenson (66 Fed., 633); and each of the following cases:

Kampmann v. Tarver (S. C. of Tex.), 29 S. W., 768;
Kellerman v. Maier, et al., 116 Cal., 416;
Christenson v. Eno, 106 N. Y., 97;
Andrews et al., v. National Foundry & Pipe Works, 22 U. S., C. C. A. Rep., 110;
Gillman v. Gross (S. C., Wis.), 72 N. W. R., 885;
Tschumi v. Hills (C. A., Kas.), 51 Pac. 619;
Stevens v. Follett, 43 Fed. Rep., 842.
See also other authorities cited on pages 22 and 23.

In view of the law as determined by the above decisions, it seems to us that the reasoning of the court below, upon this proposition was unsound (see printed transcript, pages 29 to 39). The court below admits, that the transaction between the bank and its shareholders, in the attempted purchase of this stock, was *ultra vires*, but then proceeds to argue, that because the bank fraudulently took the money, of plaintiffs in error, and thereby restored its impaired assets, to that extent, the plaintiffs in error, were in no position, to take advantage of this transaction, for the purpose of relieving themselves, of the liability to an assessment, as by the transaction each of the plaintiffs in error became invested with the legal title of all the stock purported to be represented by the certificates. In other words, the court held: That the law imposed upon each of plaintiffs in error, a penalty, for the sole reason, that the bank, had been able to defraud each of them, in a case, where neither one of the plaintiffs in error, were guilty of any laches, holding further: that, this penalty, was imposed for the sole benefit of persons, who

would have received precisely the same benefit, if the assessment had been levied against the real owners of the stock, who had attempted fraudulently to rid themselves of such burden.

The court also held, that only the government, had the right to inquire into such transactions although the transactions were prohibited both by the statute, and by public policy, overlooking the principles, determined by this court in its recent decisions in McCormick v. Market Nat. Bank (165 U. S., 538); California National Bank v. Kennedy, *supra*; First National Bank of Concord v. Hawkins, *supra*, and its own decision made only two days prior to the decision in the case of Scofield v. Goodrich Brothers Banking Co., *supra*.

The majority of the court below, also overlooked the fact, that the transfer of the certificates, to the bank, was not the transfer of the stock itself, and overlooking this, assumed that the shares of stock, attempted to be sold to the bank, were themselves, in some way, transferred to the bank, and by the bank transferred to each of the plaintiffs in error. This will be seen by reading the opinion of Justice Thayer, from which we quote the following paragraph: (The italics are ours.)

"The creditors of the bank who must be presumed to have extended credit on the security afforded by the capital stock and the statutory liability incident thereto, cannot be deprived of such security, either by the fact that the defendant was fraudulently induced to become a shareholder or by the further fact *that the bank had wrongfully acquired the stock which it subsequently sold to him*, when it appears that he knowingly became a registered shareholder, and remained such, for eight months, and until insolvency supervened and in the meantime enjoyed all the rights and privileges incident to that relation."

That this position of the court is untenable, must, upon consideration be apparent. Precisely the same argument was made in this Court in Schofield v. Thayer, to hold Thayer liable, to an assessment upon the over-issued stock purchased by him, but this court refused, to follow the argument, holding on the contrary that

Thayer, in permitting himself to be held out, as the owner of such stock, by its being registered, in voting it at meetings of the stockholders, etc., could not estop him, as the act was of that *ultra vires* character which would prevent an estoppel. All will concede, that if the capital stock, was all outstanding and no portion of it owned by the bank at the time of the issuance of the certificates, to the plaintiffs in error, that such certificates only represented over-issued stock, which under the decisions cited, would be absolutely void. The fact that Hood and Lantry for eight months severally acted as shareholders on the faith of such certificates being valid could give no validity to such certificates.

Can it be possible, that because of the fact, that prior to the issue of the two certificates, to the plaintiffs in error, the bank had attempted to purchase 800 shares of its capital stock in express violation of the statute, and had cancelled the certificates assigned to it to the amount of the shares, attempted to be transferred to plaintiffs in error, the certificates in question, were of any more validity, than they would have been, if at the time of their issuance, the bank had not made these attempted purchases, and all of its capital stock appeared to be (as it actually was) outstanding, upon the books of the bank?

If the position of the court below be correct, that the bank got actual possession of these 800 shares of capital stock as tangible things, through its transaction, and actually sold, and delivered 300 of these 800 shares to the plaintiffs in error, it would not follow that the plaintiffs in error, became shareholders, because it must be conceded, that the bank never got any title to any one, of these 800 shares; that neither it, or its receiver, would, under the decisions of this court, be estopped to say in any litigation whatever, that it did not acquire the title to a single share of this total of 800 shares.

Hence it follows that plaintiffs in error, by their purchase from the bank, got nothing, and should be no more estopped to say

that they did not acquire anything than their assignor, or its receiver, would be estopped to say, the same thing, if upon a distribution of assets by the receiver, after paying the debts, the plaintiffs in error claimed some part thereof as shareholders. If the receiver, had sued some of the shareholders, who transferred their certificates to the bank, to recover from them the assessment made against such transferred stock, could such shareholders have successfully defended, upon the ground, that although the transaction, between them, and the bank, was void, yet the bank was not injured thereby, having sold to the plaintiffs in error, the same shares of stock, and that the plaintiffs in error were the ones liable to such assessment, instead of themselves? We think it surely must be the law, that the receiver, could recover a judgment against any one or all of the parties, who attempted to transfer this stock, for the assessment of such stock. If this view be correct, would any court hold, that the plaintiffs in error would also be liable, for an assessment upon the same stock? No creditor has the right to ask for an assessment of any number of shares. of capital stock, of an insolvent national bank, beyond the number actually authorized to be issued, or which may have been issued through some attempted compliance with an authorization therefor.

VII.

That the doctrine of estoppel as applied by the court below, has no application, to one holding over-issued shares of stock, is, as it seems to us, thoroughly settled by the decisions of this court in Scovill v. Thayer, Bank v. Kennedy and Bank v. Hawkins, *supra*.

We had supposed until this decision was made that this point was thoroughly settled by the court below, in a decision rendered by it on March 4, 1895, in the case of Laredo Imp. Co. et al. v. Stevenson (66 Fed. 633), until it rendered its decision in the case at bar. We quote from the opinion in that case as follows:

"Is the defendant estopped by the fact that he once voted his stock, and that the officers of the corporation represented that its capital had been increased to $1,200,000, from asserting against the creditors of the corporation, that the stock issued to him was void? This question must be answered in the negative. Where a corporation has power to issue stock or to increase its capital stock, and this power is defectively or informally exercised, the acts and acquiescence of the stockholder may estop him from denying the validity of the stock or his liability therefor. Upton v. Tribilcock, 91 U. S. 45; Chubb v. Upton, 95 U. S. 665; Pullman v. Upton, 96 U. S. 328; Hadley v. Stutz, 139 U. S. 417, 425, 11 Sup. Ct. 530; Veeder v. Mudgett, 95 N. Y. 295, 310. But where the corporation is absolutely without power to issue the stock, or to increase the capital stock above a certain limit, no act or consent of the stockholder who receives stock issued without authority can estop him from denying the validity of the stock, or his liability therefor. The holder of such stock is under no obligation to pay for it, because he has received no consideration for such an obligation. The stock issued to him is absolutely void. He is not estopped to deny its validity, as against a creditor of the corporation, for the foundation of estoppel is deceit, and the creditor cannot be deceived as to the power of a corporation to issue such stock. He is bound to examine and know the law which limits the powers of the corporation with which he deals, and, whether he examines it or not, he is charged by the law with the knowledge of it: Scovill v. Thayer, 105 U. S. 143, 149; American Tube Works v. Boston Mach. Co., 139 Mass. 5, 29 N. E. 63; Reed v. Machine Co., 141 Mass. 454, 5 N. E. 852; Lathrop v. Kneeland, 46 Barb., 432; Merrill v. Gamble, 46 Iowa, 615; Merrill v. Reaver, 50 Iowa, 404; Clark v. Turner, 73 Ga., 1; Lincoln v. Express Co. (La.) 12 South, 937."

That the decisions of this court upon this question, have been quite generally followed, see

Chemical Natl. Bank of New York v. Cal. Natl. Bank, 120 Cal. 601;

Kellerman v. Maier, et al., 116 Cal., 416;

Christenson v. Eno, 106 N. Y., 97;

Andrews, et al., v. Natl. Foundry and Pipe Works, 22 U. S. C. C. A., 110;

Gillman v. Gross, (Wis.), 72 N. W., 885;

Kampmann v. Tarver (Tex. S. C.), 29 S. W. R., 768;

Winters v. Armstrong, Fed. 37 509;

Hayden v. Charter Oak Driving Park, 63 Conn. 142;

Page v. Austin, 10 Can. Sup. Ct. 132;

Clark v. Turna, 73 Ga., 1;

Insurance Co. v. Kamper, 73 Ala., 325;

Veeder v. Mudgett, 95 N. Y., 295:

Mallory, et al. v. Hananer Oil Works (S. C. Tenn.), 8 S. W. Rep. 396.

SECOND POINT.

The court below erred in sustaining the ruling of the Circuit Court upon the demurrer to the first defense in each answer.

FIRST.

The appointment of a receiver for this bank, and the making of the assessment ordered by the comptroller, did not limit or destroy, the right of either of the plaintiffs in error, to disaffirm their contract for the purchase of the shares of stock, under the admitted facts stated in each of the defenses.

I.

Preliminary to the discussion of the proposition stated we recall the court's attention to the following facts, to wit:

The plaintiffs in error, at the time when these actions were brought, were still in utter ignorance of the actual condition of the Missouri National Bank of Kansas City. While at that time they had the several right to assume, that each of them, had been induced to purchase this stock, from the bank, through fraudulent representations made by it, owing to its then inexplainable insolvency, yet the receiver, by his persistent refusal to permit them, to investigate the books, and other records of the bank, prevented their ascertainment of the actual facts in the case, which they believed would possibly make for each of them a defense. Subsequently, in September, when they finally obtained permission from the comptroller, to make an investigation, the first find they made, in such investigation, was the fact of the utter insolvency of the bank, from the time it commenced business, until the time its doors were finally closed; such fact at once disclosed, for the first time, to them, that the representations made, to induce the pur-

chase of stock were false and fraudulent, and entitled them to generally rescind their contracts of purchase, which they at once did, and then plead the facts, concerning the fraud, and their rescission, in their answers, before the subsequent discovery, that the bank had no stock to sell. Subsequently, after the filing of the first answers, setting out these defenses, the further investigation by their experts into the affairs of the bank revealed the fact that the bank did not own any stock at the time of its attempted sale of three hundred shares to them. Upon the ascertainment of this further fact, the present answer was filed, containing each of these second defenses, as additional to those already filed. These parties, and their counsel, yet feel that, under the uncertainties of the situation, induced by the fraudulent system of keeping the books and accounts, of the bank, each of these defenses should be maintained, to meet any possible proof, that may be made by the receiver, or the facts which may be developed on the trial. While each one of these defenses, is distinctive from the other, each one is to some extent, interwoven with the other. The first defense sets out at length the sale to the plaintiff in error, Hood, of one hundred shares of stock, and to the plaintiff in error, Lantry, of two hundred shares of the capital stock of this bank, by the bank, under such fraudulent representations as would, without question, so far as the bank was concerned, entitle Hood, and Lantry, to severally rescind the contracts of purchase, and recover from the bank the price paid, at the time when the rescission was made.

These sales were made April 18, 1896, and the bank was put in charge of the receiver December 3, 1896. The receiver, upon taking charge of the bank, entered into and retained possession of all of its property, including the rooms and furniture, where it did business, and the executive officers of the bank, left the state of Missouri, prior to the discovery of the fraud, by the plaintiffs in error.

Plaintiffs in error, upon ascertaining the fraud practiced *at once* tendered to the receiver the certificates of stock, which had

been issued to them, and demanded of him the repayment of the money paid by them to the bank for such stock. The receiver was at that time in sole possession of the bank, its rooms, and its assets, and he was the only one who could allow, at that time, these claims, as claims, entitled to participate in the distribution of such assets as he might thereafter distribute to creditors.

II.

Under the Kansas Code of Civil Procedure as construed by the Supreme Court of that state, the rule of the common law, with reference to the construction of pleadings demurred to, does not obtain; but on the contrary the rule in force, in that jurisdiction, is, that not only every fact stated, or attempted to be stated, (however defectively) in pleadings, must, as against a demurrer, be construed, not only most favorably to the pleader, but only those presumptions, which are in favor of the pleader, (arising from the facts plead,) can be considered by the court in construing such pleadings.

Stewart v. Balderson, 10 Kas. 148;
Crowther v. Elliott, 7 Kas. 235;
Stringfellow v. Alderson, 12 Kas. 112;
McPherson v. Kingsbaker, 22 Kas. 646;
State v. School District, 34 Kas. 241;
Street Railway Co. v. Stone, 54 Kas. 83;

Section 914 of the Revised Statutes of the United States, requires the adoption of this rule, by the Circuit Court, of the United States, for that district, in all common law cases, where it would be applicable.

Glenn v. Sumner, 132 U. S., 152;
Roberts v. Lewis, 144 U. S., 653;
Central Transportation Co. v. Pullman Palace Car Co., 139 U. S., 24.

Construing the allegations, in each of these defenses, against the general demurrers, filed to them, under either the rule of the

common law, or the Kansas rule, it would be difficult to conceive of a more startling case of fraud, than that, which was perpetrated, upon each of the plaintiffs in error, by the bank itself, and which admittedly, induced their several purchase of the 200 and 100 shares of its capital stock. It would also be hard to conceive of a case, wherein parties to such a transaction would be less liable to a charge of laches on their part, preceding an attempted rescission, than are the plaintiffs in error in this case.

It will be admitted by all, that the discovery of this fraud, at any time prior, to the appointment of the receiver, would have given to each of the plaintiffs in error, the instant right, to rescind their several contracts of purchase, regardless of any question of solvency, or insolvency, of the bank at the time of the rescission.

Smith v. Reese River Mining Co., Law Reps., 2 E. Q. 264;

Venezuela Co. v. Kisch, Law Rep. 2 H. L., 99;

In re Brinsmead & Sons, 67 Law J., Ch. 11, 1 Ch. 104, 77 Law, 7 (N. S. 521);

Motor Co. v. Parnell, 75 Md., 113;

Tyler v. Savage, 143 U. S., 79;

Barens et al., v. Gates (C. C. A., 4th Ct.), 89 Fed., 783.

It must be admitted, that prior to the discovery of the fraud, which had been perpetrated, upon the investigation permitted by the comptroller, neither one of the plaintiffs in error, had been guilty of any laches, such as would preclude the right, as between themselves, and the bank, to rescind the contracts of purchase.

II.

The tender to the receiver, and the demand upon him, accomplished a rescission *in pais*.

Biglow on Frauds, 75, 415.

The officers of the bank, having through their fault, necessitated the appointment of a receiver, into whose hands the bank, and

all of its property passed, prevented by their own acts, a tender back, and notice of rescission, in behalf of the plaintiffs in error, to any officer of the bank, other than the receiver, and especially is this so, in view of the fact, that these officers, had left the State of Missouri, at the time when the fraud was discovered. While the bank as a corporation still existed, it was rendered incapable of acting in any manner, relative to any of its assets by the appointment of the receiver.

Hammond v. Pennock, 61 N. Y., 145;
Guckenheimer v. Angevine, 81 N. Y., 394;
Masson v. Bovet, Den. (N. Y.), 69; this is a leading case.

The receiver, upon his appointment, became the representative, both of the creditors, and of the bank, and the only representative of the bank.

Kennedy v. Gibson, et al., 8 Wall. 498;
Robinson v. Dickey et al., 14 Tex. Civ. App., 70.

III.

The right of one, who by fraud, has been induced to purchase, from a national bank, shares of its capital stock, to rescind such purchase, and thereby release himself, from the liability imposed by the statute, is based upon the proposition, that the liability of a shareholder, in a national bank, under the provisions of Section 5151 R. S., is, in most cases, voluntarily assumed, by the contract of purchase, and, therefore, in such cases, at least contractual in its nature, standing or falling, with the contract creating it.

The failure on the part of the court below, to recognize, that the obligations, sought to be enforced in these cases, were liabilities created by contracts, and not pure statutory liabilities, or penalties, is, we believe, the chief cause, for the decision complained of. (See its decision previously made upon this point in Scott v. Latimer, 89 Fed., 843, which controlled this case.) This court has many times, in cases arising under the National Banking Act, and also in cases arising under statutes, creating liabilities on the part

of stockholders, of a corporation, similar to that created by Section 5151 of the Revised Statutes, held that such a liability, was one growing out of contract, and not a mere statutory liability, or penalty. As was recently said by Justice White, in delivering the opinion to the court, in Matteson v. Dent, (176 U. S. 521):

"The obligation of a subscriber to stock to contribute to the amount of his subscription for the purpose of the payment of debts is contractual, and arises from the subscription to the stock. * * * The obligation to respond is engendered by and relates to the contract from which it arises. * * * The question was settled in Richmond v. Irons, 121 U. S., 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788, where the court said (pp. 55, 56, L. ed. p. 873, Sup. Ct. Rep. p. 801):

"'Under that (the national banking) act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings, and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder.'"

Justice Harlan, in delivering the opinion of this court, in the case of Stewart v. Hayden, (169 U. S. 1), uses the following language:

"This court has said that 'the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholders."

See also to same point in another national bank case:

Richmond, et al. v. Irons, et al., 121 U. S. 27.

See following decisions of this court upon similar State statutes:

Hawthorne v. Calef, 2 Wall., 10;

Flash et al v. Conn, 129 U. S., 371;

Whitman v. National Bank of Oxford, 176 U. S. 559.

In this last case, there is quite an exhaustive review, of the authorities, on the question.

While every person, who becomes a creditor, of a national bank, has the right, to rely upon the fact, that if the bank, should become insolvent, while he remains a creditor, its registered shareholders, would *prima facie* be liable to an assessment, equal to the amount, of the outstanding capital stock, held by them, yet one giving credit, to a national bank, has no right to rely upon the proposition *that any one individual shareholder, will remain such shareholder* (subject to the liability of the statute) *for any period of time*, however much such person's connection with the bank may have influenced the credit given; neither has such a person the right to *conclusively* presume, that the names of those appearing on the list, of registered shareholders, upon the insolvency of a national bank, are all rightfully there.

Pauly v. State Loan & Trust Co., 165 U. S., 606;

Whitney v. Butler, 118 U. S., 655;

Stuart v. Hayden, *supra*.

Every creditor, or proposed creditor, of a national bank, is charged with the knowledge, that every shareholder, of such bank, can cease to be a shareholder, and relieve himself, from the liability, assumed by the ownership of some of its shares, at any time, either by the transfer in good faith, on the registry of the bank, of his shares of stock, to some one else, or by rescission of the contract, which created him a shareholder, when the right of rescission exists. To presume, therefore, (as did the court below) from the facts stated in each of these defenses, that during the connection of the plaintiffs in error, with the bank, their names obtained for it credit, it otherwise, would not have had, not only ignores the Kansas rule referred to, concerning presumptions, arising from plead-

ings demurred to, but adds no argument against the right of each of the plaintiffs in error, to rescind the contract, at the point of time, each did rescind. This several right on their part, to rescind their several contracts of purchase, *was created by the principles of equity and of the common law, and not by force of any statute.* There being no statute giving the right to rescind, under facts such as are stated in these defenses, or under any state of facts for that matter, or fixing the time, within which such rescission should be made, the time, of the exercise of such right, is only limited, and controlled, by the requirements of the rule in equity and at common law, which created it. The only limitation imposed by equity or the common law, as to the time when the right of rescission must be exercised, in this class of cases, is, that it must be exercised, within a promptly reasonable time after discovery, (by the party injured), of the fraud creating such right. In the case at bar, the rights of Hood and Lantry, can be fully protected in this action at law, and hence they were not required to proceed in a court of equity, to cancel the certificates severally issued to them, as a court of equity would have had no jurisdiction of such an action.

Buzard et al. v. Houston, 119 U. S., 347;

Ins. Co. v. Bailey, 13 Wall., 616;

Grand Chute v. Winegar, 15 Wall., 373;

White v. Boyce, 21 Fed., 228;

Thompson on Corp., vol. 2, sec. 1424, *et seq.*

We quote from Cook on Corporations (vol. 1, par. 152, 4th ed.) as follows:

"There are, in general, five different remedies which are open to a subscriber induced to subscribe by fraud. He may, upon discovering the fraud, rescind the subscription by notification to the corporate authorities, without taking legal proceedings; or he may wait until sued upon the subscription, and then set up the fraud as a defense to the action at law; or he may file a bill in equity to restrain such suits at law, and to set aside the subscription contract, and also, if he wishes, to recover back payments already made on the subscription; or he may bring an action at law against the par-

ties fraudulently inducing the subscription, and recover damages for the deceit; or he may sue for money had and received."

The proposition above stated, is illustrated in the analagous cases of insolvency, where there has been an assignment, or a receiver appointed, and is also illustrated, by the decisions, under most bankruptcy laws. In such cases, it has generally, (if not universally) been held, that the assignment, or the appointment of a receiver, in no way affects rights, which could be asserted against an assignor, or bankrupt, if no assignment had been made, or receiver appointed. This is well illustrated by the following decisions of this court, each of which, seems to us, very applicable, and very much in point:

Donaldson, assignee, v. Farwell, et al., 93 U. S., 631;
Yeatman v. Savings Institution, 95 U. S., 766;
Stewart v. Platt, 101 U. S., 738;
Porter v. Lazer, 109 U. S., 84.

Guided by the common law, (there being no statute), this, and other courts, have frequently held, that a receiver, of a national bank, upon his appointment, takes *all* of the assets of the bank, (including the shareholders' liability), in trust, for the creditors, and the stockholders, *subject to all claims, and defenses, that might have been interposed, against the insolvent corporation itself, with respect to any of such assets.*

Scott v. Armstrong, 146 U. S., 499;
Whitney, et al., v. Butler, 118 U. S., 655;
Lincoln v. Fitch, 42 Me., 456;
Winters v. Armstrong, 37 Fed., 509;
Cutting, Receiver, v. Damerel, 88 N. Y., 411;
Hayes v. Shoemaker, 39 Fed., 319;
Young v. McKay, 50 Fed., 394;
Snyder v. Foster, 73 Fed., 136.

As stated by this court in the head-notes to the case of Scott v. Armstrong, *supra*:

"The receiver in such case takes the assets in trust for the creditors, and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed against the insolvent corporation."

See also:

Fourth Street Bank v. Yardley, 165 U. S., 653;

Yardley v. Philler, 167 U. S., 360;

Earl v. Commonwealth of Penn., 178 U. S. 449.

The proposition as stated in Winters v. Armstrong, (37 Fed. 508) in reference to the question here discussed by the late Justice Jackson is as follows:

"The receiver stands in the shoes of the bank and can assert no rights against the subscribers which the bank could not have asserted."

As was said by the Supreme Court of Maine, in the case of Lincoln v. Fitch, *supra*:

"The receivers of a bank, appointed to close its concerns, have no rights superior to those which the bank would have had if its management had remained in the hands of the directors; and the liabilities of third parties to the bank are not increased or otherwise varied by the appointment of receivers."

See also upon precisely the same point:

Cutting v. Damerel, 88 N. Y., 410;

Farley v. Lincoln, 51 N. H., 577;

Bussing v. Rice, 2 Cush., 48;

Wallace et al., v. Cohen et al., (N. C.) 15, S. E. 892.

One of the most important assets, that is vested in a receiver of a national bank, is the liability of the shareholders, of such bank, to respond, to an amount equal, to the face value of the shares of capital stock, held by them. It is hard to perceive upon what theory a shareholder, might prevent the enforcement of any other liability by a receiver of a bank growing out of a contract made with the bank while it was a going concern, on the ground that such contract, was induced by the fraud of the bank, and yet

The same principle was decided January 3, 1901 by Sup. Ct. of Errors of Conn., in New Haven Trust Company v. Nelson, Atl. Rep. Vol. 47, 7

not have the right, to make the same defense, against his liability as a stockholder, in a case, where he was induced to become a shareholder, through a contract with the bank procured by fraud, and in a case where he has not been guilty of laches, in not discovering the fraud, prior to the appointment of a receiver.

IV.

Following the principles established by the authorities above cited, it has generally been held, in the United States, where the question has arisen, that the assignment of, or the appointment of a receiver, for a corporation, on account of insolvency, does not, of itself, cut off from a stockholder in such corporation, his right to rescind his contract of subscription, or purchase of stock, induced by the fraud of the corporation if he has not been guilty of laches in asserting such right, prior to the insolvency of the corporation.

In the Eighth Circuit, until the recent decision made by the Circuit Court of Appeals of that Circuit, in the case of Scott v. Latimer, *supra*, the rule was clearly established, that the insolvency of a corporation, did not, of itself, bar the right of a subscriber to rescind a contract of subscription, or purchase of stock, induced by the fraud of the corporation, if the stockholder seeking to rescind was guilty of no laches in the matter. The earliest case touching this question, reported in that Circuit, is that of Upton v. Englehart (3 Dill., 496). This case was heard upon demurrer to a plea by Circuit Judge Dillon and District Judge Lowe; Judge Dillon, in delivering the opinion, exhaustively reviews the question of the right of a stockholder in a corporation, induced to become such by fraud to rescind his contract of subscription and purchase; and, although the case did not involve this precise question, yet the opinion, is well worth considering in this connection, as it has become a leading case, to some extent, upon questions involved in most cases of this character. This decision was followed in the same court, by decision given by the late Justice Miller, in the case of Farrar v. Walker et al., (3 Dill. 506). In this case Justice Miller, in re

viewing the question at bar, held: That a stockholder in a corporation, who had been fraudulently induced to become such, could rescind his contract, even after the appointment of an assignee for the corporation, in insolvency, provided he had exercised the diligence required by the law. This decision of Justice Miller was made October 15, 1875. In that same month, this court delivered its opinion in Upton v. Tribilcock, (91 U. S., 45). This case has been cited, both for, and against, the right of a stockholder in a corporation, to rescind his contract of subscription or purchase of corporate stock, after the insolvency of the corporation, a receiver or an assignee has been appointed. A careful reading of the opinion, must convince anyone, that, in so far as this court decided this question at all, in that case, it refused to adopt the proposition, that insolvency, and the appointment of an assignee, of itself, destroyed, the right of a stockholder, to thereafter rescind. While there was a division of the court, in this case, it is evident, that the division was only upon the question, as to whether there was sufficient evidence of fraud, and sufficient evidence of diligence in ascertaining it, to submit these questions to the jury.

The first time the question actually came up for decision in the court below, was in the case of Newbegin v. Newton National Bank, (14 U. S. C. C. A., 71; 66 Fed., 701). This case was heard before the same Justices who heard the case at bar. As the case was a *per curiam* decision, we quote the syllabi in full as follows:

"One induced to subscribe for certificates alleged to represent an increase of the capital stock of a national bank at a time when no increase had been authorized, upon false representations of the cashier as to the bank's condition and ability to pay dividends, it being, in fact, insolvent at the time, is entitled to a judgment against the bank and its receiver for the purchase money paid.

"In an action against a national bank and its receiver to recover money paid under false representations as a subscriber for an increase of capital stock, a jury being waived, the court found facts clearly entitling plaintiff to recover. It then further found that the certificates of stock were issued on July 22, 1890; that the bank had no authority to issue such certificates; that the increase of stock was

not authorized until the twenty-fourth day of September, 1890; that plaintiff was guilty of laches in not returning said certificates and demanding his money until after the bank had passed into the hands of a receiver, and in not bringing his action to recover said money sooner. The court thereupon rendered judgment for defendants. *Held*, that there was nothing in the finding sufficient to support the conclusion as to laches, and that the judgment must be reversed."

After the reversal of the judgment in the Circuit Court of Appeals, the case was re-tried in the Circuit Court. At the time of the new trial, some changes had taken place, in the status of the bank, but the question involved in that trial, was precisely the question here discussed. Upon the new trial, Newbegin obtained a judgment, which was brought again to the Circuit Court of Appeals, (20 U. S. C. C. A., 339; 74 Fed., 135), and again heard by the same Judges, who heard the case before, and they affirmed the decision of the court below, Justice Thayer delivering the opinion of the court, from which we quote at length, as follows:

"A more important question to be next considered, is whether the Circuit Court should have directed a verdict for the defendants on the ground that the insolvency of the defendant bank, occurring before the suit was filed, precluded the plaintiff from rescinding his stock subscription. It has become the settled rule in England since the decision in Oakes v. Turquand, L. R. 2 H. L., 325, 344, that a suit to rescind a stock subscription on the ground of fraud cannot be maintained by a stockholder, no matter what diligence he may have shown, after proceedings have been taken to liquidate the affairs of the corporation, on the ground of its insolvency, inasmuch as the rights of creditors of the corporation, both as against the corporation and those who are registered shareholders, then become superior to the rights of the defrauded shareholder. Stone v. Bank, C. P. Div. 282, 307; Wright's case, 7 Ch. App. 60; Kent v. Brickmaking Co., 3 Ch. App. 493; Thomp. Corp. Sections 1439, 1441; Cook Stock & Stockh., Section 163.

"In this country there are some cases in which a stockholder's right to rescind his subscription after the intervention of proceedings in bankruptcy or after the insolvency of the corporation has been denied; but, as Mr. Thompson well remarks in his Commentaries on the Law of Corporations (Sec. 1449), it does not appear in any of the cases that the denial of the right to rescind was grounded exclusively on the fact that proceedings in bankruptcy

had been instituted, or that the corporation had become insolvent. Farrar v. Walker, 3 Dill. 506, note, Fed. Cas. No. 4679; Upton v. Tribilcock, 91 U. S. 45; Ogilvie v. Insurance Co., 22 How. 381, 391; Michener v. Payson, Fed. Case No. 9525; Duffield v. Ironworks 64 Mich. 293, 31 N. Y. 310; Turner v. Insurance Co., 65 Ga. 649; Ruggles v. Brock, 6 Hun. 164; Hurd v. Kelly, 78 N. Y. 588; Howard v. Turner (Pa. Sup.) 26 Atl. 753. In all of these cases the evidence showed that there had either been some lack of diligence on the part of the stockholder in discovering the fraud of which he complained, or unreasonable delay in asserting his rights after the discovery of the fraud, or active participation in the management of the corporation, or that debts had been contracted by the corporation subsequent to the subscription, which either gave to corporate creditors superior equitable rights, or estopped the shareholders, as against a corporate creditor, from asserting that he was not a shareholder. The question whether a stockholder should be permitted to rescind his subscription, on the ground of fraud, after the insolvency of the company, is attended with much doubt and difficulty because of the peculiar relation which a shareholder sustains to the creditors of the company. In the case of Upton v. Englehart, 3 Dill. 496, 505, Fed. Case No. 16,800, Judge Dillon, while discussing the subject, pointed out that the unbending English rule above referred to was influenced in a measure by the companies act (25 and 26 Vict. C. 89), which makes provision for a 'register of stockholders' to which the public have access, and that as no similar register of stockholders is ordinarily kept in the United States, the English decisions holding that the commencement of a proceeding to wind up a company, is in itself, a bar to a suit for a rescission, are not strictly applicable to the conditions which prevail here. He concluded the discussion of the question as follows:

"'I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an innocent person into the purchase of stock—he at the time being guilty of no want of reasonable caution and judgment, and afterwards being guilty of no laches in discovering the fraud—and he thereupon, without delay, notifies the company that he repudiates the contract, and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company, subsequently happening will not enable the assignee to insist that the purchase of stock is binding upon him.'

"There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no

facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made, if the subscriber has actually participated in the management of the affairs of the corporation, if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud or in taking steps to rescind when the fraud was discovered; and, above all if any considerable amount of corporate indebtedness has been created since the subscription was made which is outstanding and unpaid—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern. There is some force, doubtless, in the view which has sometimes been taken by eminent judges that when a person has been inveigled into making a stock subscription by representations that were clearly false and fraudulent, he should be entitled to rescind his subscription, even after the insolvency of the company, under the same circumstances that would entitle him to rescind a contract of a different nature; that is to say, by proof of due diligence in discovering the fraud, and of prompt action after it was discovered. Upton v. Tribilcock, 91 U. S. 55, 56; Duffield v. Ironworks (Mich.) 31 N. W. 310, 316. See also, Improvement Co. v. Merrill, 2 U. S. App. 434, 2 C. C. A. 629, and 52 Fed. 77."

The case of the Florida Land and Improvement Company v. Merrill et al., decided in the Circuit Court of Appeals, sixth circuit, and reported in the 52 Fed. Rep. p. 77, is a case very much in point. We quote the second point of the syllabus which reads as follows:

"When bank stock is fraudulently sold, and the proceeds are turned over to the bank, and a receiver is subsequently appointed, no creditor of the bank can be said to have any such interest in the proceeds as would prevent restitution and a rescission of the sale; and such appointment of a receiver does not, in itself, show that there are creditors of the bank who have prior equities."

This case again went to the Circuit Court of Appeals and is reported in 60 Fed. Rep. 17. We quote the head notes of this decision, which reads as follows:

"An intending purchaser of bank stock is entitled to rely upon a statement of its president as to the bank's condition, without inquiring further.

"The receipt by a bank of the proceeds of a fraudulent sale of stock belonging to it, and the subsequent appointment of a receiver, give its creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. 52 Fed. Rep. 77; 2 C. C. A. 629; 2 U. S. App. 434, reaffirmed."

We quote at length from the very clear and able opinion of the late Justice Jackson, in Winters v. Armstrong, *supra* (37 Fed. Rep. 509), upon this question, as follows:

"The claim made by one of the counsel for the receiver, that his position as the representative of creditors is better than that of the Fidelity National Bank, and that he can enforce rights on behalf of creditors which would not exist in favor of the association, is not sound as applied to a case like the present. When the conclusion is reached that Winters, Strange and Woods are only to be regarded and treated as subscribers for valid stock which has not been, and cannot be, issued to them by the association, the receiver cannot, in behalf of either the bank, stockholders or creditors, enforce against them any right which the association could not itself have asserted. A receiver cannot enforce the payment of subscriptions to stock which the corporation could not have enforced at the time of his appointment. Cutting v. Damerel, 88 N. Y. 410. In respect to contracts of this character the receiver occupies no position superior to that of the bank for the reason that the corporate management, while in charge of its business, just as much as a receiver after his appointment, represents the interests of all persons, creditors as well as shareholders. When the corporation is insolvent the rights of creditors in respect to the corporate assets become most prominent and a receiver appointed to administer or collect such assets is regarded as more directly the representative of creditors. In a certain class of cases a receiver may assert rights which the corporation could not, thus he may disaffirm illegal and fraudulent transfers of corporate property and may recover his funds and securities which have been misapplied. The governing officers of a corporation cannot, for example, release a stockholder or a subscriber for its stock, for his obligation to pay, to the prejudice of creditors. They cannot return to stockholders the capital stock of the corporation, which constitutes a trust fund for the benefit of creditors, to the injury of such creditors. They can make no fraudulent disposition of the corporate property for their private benefit, or for the benefit of the stockholders, leaving creditors unprovided for. These and like

transactions involving the misapplication or fraudulent disposition of corporate property a receiver may disaffirm, and recover such assets for the benefit of creditors, when the corporation might not be in a position to do so. Wood v. Downer, 3 Mason 308; Curran v. Arkansas, 15 How. 304; Burke v. Smith, 16 Wall. 390; New Albany v. Burke, 11 Wall. 96, and Sawyer v. Hoag, 17 Wall. 619, afford illustrations of the cases in which receivers may assert rights which the corporation or corporate management could not enforce. But the present case involves no such principle. Subscribers to the new stock, which they have not, and cannot obtain, are in no sense the recipients of the corporate property or assets which have been fraudulently or wrongfully divested, misapplied, or disposed of to the prejudice of creditors. The rights and obligations growing out of these subscriptions rest upon contract, and in respect to such matters the receiver stands precisely in the shoes of the association and can only enforce what it could have enforced at the date of his appointment, and is subject, so far as the assets of the bank are concerned, to the same obligations as the bank would have been under had it continued in existence and never passed into the hands of the receiver. The Fidelity National Bank could not, under the facts stated, have enforced the payment of the notes executed by Woods and Strange; neither can the receiver do so. Winters could have recovered his deposit made on his subscription as against the association, and he is entitled to its allowance as a valid claim against the assets of the bank in the hands of the receiver, so far as anything disclosed by the pleadings appears."

In the case of Beale v. Dillon, decided by the Court of Appeals of Kansas, and reported in the 47 Pac. Rep. 317, the court determines the following proposition, as appears from the head notes of the case, reading as follows:

"An assignee at law of an insolvent corporation may maintain an action against a delinquent stockholder therein to collect an unpaid subscription to the capital stock of such corporation, and in such action the stockholder may interpose the defense that he was fraudulently induced to become a subscriber to the capital stock through the false and fraudulent representations of the corporation and its officers."

This question was considered and passed upon by the United States Circuit Court of Appeals of the seventh circuit, in the case of Andrews v. National Foundry and Pipe Works, 22 C. C. A. 110, 76 Fed. Rep. 166, and the above decisions practically followed.

The position contended for was sustained by the Supreme Court of Missouri in the case of Haskell v. Worthington, 7 S. W. Rep. 481.

The same court, in the more recent case of Ramsey v. Thompson Mfg. Co. et al., 22 S. W. Rep. 719, reaffirmed this decision upon a review of all the authorities. In this last case, Justice Burgess, in delivering the opinion of the court, states the position of that court as follows:

"And while Mr. Cook says that the decided tendency of the decisions in this country is that corporate insolvency is a bar to such rescission, and the fact that the subscription was obtained by fraud and fraudulent representations, is not available as a defense in a suit against the subscriber to compel the payment of his stock, this court seems to have held otherwise in the case of Haskell v. Worthington, 94 Mo. 560, 7 S. W. Rep. 481. Brace, J., in delivering the opinion of the court in that case, which was an action by the assignee of a corporation upon a subscription to its capital stock, to recover the par value of the shares for which the defendant had subscribed, held that, as the assignee stood in the shoes of the corporation, it was a good defense to show that the corporation had entered into actual business with less capital stock subscribed than having by his conduct estopped himself from setting up the defense: that the assignee occupied no better position than the corporation did."

See also:

Whitney et al., v. Butler, 118 U. S., 655.

We quote at length from the opinion of Chief Justice Campbell in the case of Duffield v. E. G. Barnum Iron Works Co., 64 Mich., 293, as follows. (In this case the court was equally divided):

"The question seems to be narrowed to the inquiry whether the amount stated in its articles of incorporation, the defendant not plaintiff is deprived of his remedy by the subsequent assignment. If there was no fault in not discovering the wrong, and if the suit was brought before any opposing claims had obtained a preference, it cannot be said there was any waiver, and it is difficult to see anything which can be treated as an estoppel. There is no foundation in reason or in law, so far as we can discover, for holding that he is debarred of complaint because others have also

been subsequently defrauded. A creditor who becomes such by fraud in obtaining his money for one purpose, has as distinct an equity as those who were afterwards defrauded or persuaded into giving credit for goods or supplies. Under our statutes stockholders are not personally liable to contribute beyond what will pay up their stock, and creditors cannot enforce any rights, under the assignment, against paid-up stock at all. But the suit of plaintiff is based on the claim that he never was properly to be considered a stockholder by the company, and, under this assignment, if anything, had remained unpaid on his shares, it would have been as a balance collectible by the company as his subscription, and not a debt due to creditors themselves as such. In England the winding up process is mainly to enforce contribution from shareholders, upon the theory that credit is given them as such. But even there it is very clearly held that the distinction taken between defrauded stockholders who sue before winding-up proceedings, and those who delay until after, does not depend upon any principle of estoppel in favor of creditors acting in faith of their membership, but upon the legal position which they are placed in by the winding-up proceedings whereby all persons registered as shareholders become, by operation of law, bound to contribute, because those proceedings themselves fixed their status.

"This is very clearly explained in Stone v. City and County Bank, Ltd., 3 C. P., Div. 282; and in that same case, where the authorities are reviewed and explained, it was strongly intimated that while after the proceedings begun for winding up, the plaintiffs could not avoid being treated as shareholders, they might have sued in that capacity for the damages incurred by the fraud of the company, which induced them to buy stock, and been treated as creditors for the damages.

"In Smith's case, before cited, it was expressly decided that creditors had no better claim than defrauded shareholders to sue for redress, and could not be preferred to them under circumstances which did not fix a legal priority. Lord Cairns there remarks: 'It is one of the risks, and it ought to be known that it is one of the risks which creditors are liable to in dealing with limited companies, that it may turn out that some person whose name has been entered as a shareholder in the list has a right to have his name taken off the list if he can prove that it has been fraudulently inserted there, and if he comes with promptitude to have the fraud redressed.' In other words, it is considered that, unless personally in the wrong in some way, all creditors stand on an equal footing for redress until, by some process, which the law has authorized to have that effect, they are placed on a different footing; and, if this is so, any remedy which is seasonably resorted to must be sustained.

"It is the settled law of this state that a creditor who has obtained security by attachment or otherwise before a general assignment cannot be deprived of his preference by that or any other subsequent action of his debtor. If he was defrauded, it is equitable that he should have a remedy; and if he has not contributed himself to mislead other creditors, there is no legal provision in this state to prevent him from seeking it in the same way as if no other creditors existed. None of our corporation statutes create any such difference in ordinary cases. How far it is done in the specific cases of personal liability existing in some instances by constitutional or statutory provisions, we need not inquire. The present case is no such case, and the assignee, or the receiver who represents him, only holds the property and rights of the corporation and not rights which the company itself could not enforce, except perhaps where property of the company has been fraudulently transferred. In this respect it varies considerably from the English winding-up acts. But as the suit here preceded the assignment, it would have been in season even there.

"In our opinion, the plaintiff had a plain right to maintain his action based on the fraud complained of, and the court below erred in holding otherwise. The judgment must be reversed and a new trial ordered. If the funds representing the attached property and reserved for this case are sufficient, without impairing the claim in controversy, the costs will be paid out of that. If not, they will be paid like other legal charges by the receiver."

In the case of Robinson v. Dickey et al. (14 Tex. Civ. App. 70), this question is passed upon as follows:

"1. Plaintiff, induced by false representations made to him by the officers of a bank, that the bank was solvent, and that the shares of stock which were to be delivered to him as part consideration were worth their face value, contracted to convey certain lots to the bank, on its agreement to erect a building thereon. The bank never completed the contract, further than to deliver the stock, and subsequently went into the hands of a receiver. *Held*, that plaintiff was entitled to a rescission of the entire contract on tender of the stock itself to the receiver."

See also recent decision of the Court of Chancery of New Jersey in Tierney v. Parker, 44 Atl. R., 151, and the decision of the Supreme Court of Virginia, in Weisiger et al., v. Richmond Ice Mach. Co., 20 S. E., 361.

We call attention to the recent decision of the Circuit Court of

the Ninth Circuit in the case of Stufflebeam v. De Lashmutt, 101 Fed., 367, as bearing on this, and as supporting the proposition contended for.

Also to the very able and clear review of the authorities upon this question made by Chief Justice Robinson, in the case of Savage v. Bartlett, etc., 78 Md., 561.

IV.

The somewhat recent decision of the court below (by a divided court) in the case of Scott v. Latimer, heretofore referred to, (89 Fed. Rep., 843), changed the rule in the Eighth Circuit, and practically decided (in advance of their reaching that court) the cases at bar.

As we read the decision in Scott v. Latimer, it is mainly placed upon the ground: That the liability of a stockholder is not contractual, but entirely statutory, and that although the contract, by which the stock is acquired, be induced by fraud, the rescission of such contract, cannot release the liability imposed by the statute (regardless, we should say, whether a receiver had been appointed or not). This, fully appears, from the 2nd, and 3rd, points of the syllabi, in the case, but more clearly, from the following extracts taken from the opinion of the majority of the court:

"If it be true that the subscription to the stock was obtained by false representations touching the pecuniary condition of the bank, that did not make the contract absolutely void, but only voidable at the option of the subscriber; and, therefore, when the bank was put in liquidation, the corporate creditors had the right to enforce the statutory liability against all persons who were then stockholders. * * Suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholder. * * * The right of the creditor to enforce the statutory liability against shareholders in a national bank is not dependent upon the terms of the stock subscription contract. * * * The liability sought to be enforced in this case is not one created by contract existing between the corporation and its stockholders, but is one created by statute in favor of creditors, and not in favor of the corporation. And it is a

liability which cannot be affected, discharged, or released by any action taken by the corporation, or by the combined action or agreement of the corporation and its stockholders. * * * * It is thus made clear that the liability sought to be enforced in this case is not dependent upon the terms, or in fact upon the existence, of a contract of subscription to the capital stock of the bank, but it is a liability imposed by statute in favor of creditors, and it is a liability, as already said, which cannot be modified or released by any action on the part of the corporation, or of the corporation and its stockholders. It is created for the benefit of the creditors, and no action on the part of the bank can estop the creditors from enforcing their rights in this particular. * * * As already said, this suit is not based upon the contract of subscription between the bank and the plaintiff in error, and is not, therefore, an action wherein the issue can be made as to the voidability of that contract, as between the bank and the shareholders. The suit is on behalf of the creditors to enforce the statutory liability, in which the bank has no interest; a liability which was not created by any contract to which the bank was a party; a liability which it is beyond the power of the bank to modify, release, or discharge; and a liability which, if once called into existence by the act of one assuming the position of a stockholder, cannot be defeated, save by the creditors, or some one acting in their behalf."

That the theory of the majority of the court in this case, that the contract of subscription or purchase has nothing to do with this liability is untenable, we have already seen.

We call attention of the court to the very vigorous, dissenting opinion of Justice Sanborn in this case, found on pages 856 to 865, quoting from it, as follows:

"It is held in those cases (the cases cited and relied upon by the majority of the court) that those who knowingly permit themselves in various ways to appear to be stockholders, those who were stockholders, but presented the false appearance that they were not, and those who fraudulently transferred their stock to irresponsible parties to escape liability, were estopped from defeating creditors of the corporation in their attempts to hold them as such. It is, indeed, repeatedly stated in those cases that the property of an insolvent corporation and the liability of the stockholder are a trust fund pledged for the benefit of the creditors; and that is equally true of every insolvent person. But in none of these cases —in no case cited by the court or counsel—was the holder of the stock duped into his place and liability by undiscoverable fraud.

In none of them did any court hold that money obtained from, or liability imposed upon, a stockholder by fraud which he could not discover are a trust fund held for the benefit of the creditors of the corporation which perpetrated the fraud. Can a debtor by fraud confer upon his creditors any greater right to the property or liability of his victim than he gets himself? * * * Why is not the right of one who is induced by fraudulent representations of a bank to buy its stock to a rescission of that sale and a release of the liability it imposes superior to the claims of its creditors, or its receiver to enforce them? * * * * In all the cases cited by the majority either a valid contract of subscription of purchase existed, or the stockholders were estopped from rescinding a voidable contract, because they had acted as such after they knew, or might have known, the facts upon which they relied to avoid it. In the case at bar the contract was induced by fraud, and it was concealed by fraud. In this case no estoppel against the plaintiff in error can be sustained, because he did not know and could not learn the facts, and no duty to speak or act rested upon him until he acquired that knowledge, or means of knowledge.

"The bank induced the plaintiff in error to play the part of a stockholder, and thereby to lose all the money he deposited with it, and to run the risk of liability to lose as much more by the same scheme of false representations of its solvency, of its flourishing conditon, and of its increase of stock, which doubtless induced the creditor to take the bank's promise of repayment for the money he deposited with it. In such a case, why should not the right of the purchaser of stock who suffers the greater wrong be equal to that of the creditor who suffers less? Neither of them was aware of the fraud, neither of them did or could discover it until both were injured. Neither of them knowingly or negligently deceived the other, and, in my opinion, neither of them is entitled to estop the other from undoing the fraud from which they suffer."

See also, McClenathan v. I. L. & I. Co., (Va.), 30, S. E. R., 450.

V.

The decisions of the courts in England followed by the court below do not militate against the proposition stated. The leading case of Oakes v. Turquand (L. R. 2, H. L., 325), and the subsequent cases, are each and all based upon the provisions of the English Act of 1862, entitled, "An Act for the Incorporation,

Regulation and Winding Up of Trading Companies and Other Associations" (Ch. 89, 25-26, Vict). See appendix, where some of the provisions are set out. This Act contains some 212 sections, collecting into one code the provisions which were thenceforth to be applicable to incorporations of the character provided for in the Act. By this Act, a public officer was appointed for keeping a register of, among other things, the name of the projected company; a statement of the nature of its intended business; the amount of its capital; the names and addresses of every subscriber, with the number of shares taken by him and the amount paid on each share. It further provides that the register shall be open to inspection, not only of the members, but all other persons, and that any person, whose name has been wrongfully registered may apply to any Superior Court of law for equity for a rectification of the register. In the event of the company being wound up the Act provides that every member shall be liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities.

Section 38 of the Act provides that shareholders within the preceding year, who have disposed of their shares, and are not registered at the time of the commencement of the winding up proceedings, shall, under certain circumstances and conditions, be liable to the payment of the debts, upon the winding-up of the corporation.

Shortly prior to the decision in Oakes v. Turquand, the House of Lords in the case of Railway Company v. Kisch (L. R. 2, H. L. 99), determined that one whose subscription to capital stock in an association was induced by fraud, had the right, upon the discovery of the fraud, to rescind his contract of purchase to the same extent as an individual would have the right in a contract between himself and another individual to rescind such contract for fraud.

Following this decision, came the case of Oakes v. Turquand, which we do not believe ever should have been construed as deter-

mining, even under this Act, that the commencement of winding-up proceedings, against a corporation, cuts off the right of a shareholder, under any, and all circumstances, to rescind his contract, of subscription, and have his name removed from the register. This belief is strengthened by the head-notes to the case, a portion of which we quote, as follows:

"Where a memorandum of association (which was registered) differed from the prospectus on which it professed to be founded, and on which as setting forth the true objects of the association, A, had become a shareholder, though he, on discovering the difference, might have repudiated his shares, he could not after the failure of the company, relieve himself from liability to contribute to the debts of the association, on the ground that he had been ignorant of something which, with proper diligence, he might have known.

"It is the duty of a person taking shares in a company to use reasonable diligence in making himself acquainted with the provisions of the memorandum of association. He must take the consequences of the negligence." * * * "A applied, on the face of statements in the prospectus, for shares in a limited liability company. They were allotted. His name was put on the register of shareholders. At the end of nine months the company failed. It was ordered to be wound up. A then applied to have his name removed from the list of contributories;

"*Held*, affirming the decision of Malins, V. C., that it was properly placed there."

Conceding, however, for the sake of the argument, that this case, is as broad, as it has been construed to be, by some courts, and some text-writers, yet, it ought not to be an authority, in a case like the one at bar, as there are many notable distinctions, between the English Act, and the Acts of Congress, concerning national banks, some of which we call the court's attention to, as follows:

There is no requirement in the national banking acts, that one, having a right from any cause, to have his name removed from the registered list of stockholders shall proceed, in a court, to compel the taking of his name, from the register. The registered list of shareholders required to be kept by the bank is only *prima facie* correct, and only throws upon one, whose name appears upon such register, the burden of proving that it is not rightfully there; such

proof being always admitted, when for any reason a person, whose name appears upon the register, denies that it is rightfully there.

Whitney v. Butler, *supra;*
Hawley v. State Loan & Trust Co., *supra;*
Snyder v. Foster, (C. C. A. 5th Cir.), 73 Fed., 136;
Ricaud v. W. S. & T. Co., (C. C. A. 4th Cir.), 70 Fed., 424;
Young v. McKay, (C. C. N. D. Calif.), 50 Fed., 394;
Hayes v. Shoemaker, (C. C. N. D. N. Y.), 39 Fed., 319.

It must be conceded that a shareholder, in a national bank, induced to become such by the fraud of the bank, may, while it is a going concern, make a common law rescission, of his contract of purchase, and relieve himself from all liability.

Neither is there any provision for a public registry of names of the shareholders, in any national bank, which may be examined, by the public at large, or by any one, who intends becoming a creditor of such bank. The provisions of Sec. 5210, R. S., after providing for the keeping of a list of the shareholders, with the names and residences, provides:

"Such list shall be subject to the inspection of all the shareholders and creditors of the association and the officers authorized to assess taxes under state authority, during the business hours of each day in which business may be legally transacted. A copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency."

Under the many decisions of this court, it is not essential that a person should be registered on the list of stockholders, in order to be held liable as a stockholder; neither is it essential that a person whose name may once have been rightfully on the register should see that it is removed, before insolvency proceedings, under penalty of being held as a stockholder, on account of such registration, if he has taken all the steps necessary to be taken, without resorting to a court, to have his name removed.

As we have seen, there is no act of Congress which places a receiver appointed for a national bank, in any better position, as to the assets of the bank, than would the assignee of an individual insolvent for the benefit of creditors, be placed in, by the rules of the common law.

THIRD POINT.

The court below erred in affirming the ruling of the Circuit Court sustaining each of the demurrers to each of the cross-petitions.

I.

Each of these answers included in addition to the defenses referred to, a cross-petition, against the receiver (based upon the facts stated in each of the separate defenses), to recover a judgment for the amount paid to the bank for this stock, asking that such judgment, when recovered, be paid by the receiver out of the funds in his hands, pro rata. The right to set up these counter-claims, in the answers, is given by sections 94 and 95 of the Kansas code, stating what an answer can contain.

Section 94 * * *

"A statement of any new matter constituting a defense, counter-claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition."

Section 95 reads as follows:

"The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. * * *"

The facts stated in this cross-petition, under the decisions of the Supreme Court of Kansas creates a counter-claim that can be used as a set-off.

In the case of Fanston v. Linsley, 20 Kan. 235, the second and third points of the syllabus are as follows:

"2. *When tort may be waived; benefit to wrongdoer.* Whenever one person commits a wrong or tort against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, *imply* or presume a contract on the part of the wrongdoer to pay to the party injured the full value of all benefits resulting to such wrongdoer. And when the injured party elects to waive the tort, his cause of action may be used as a set-off.

"3. *When a tort may not be waived; naked trespass.* Where one person commits a wrong or tort against another, without any intention of benefiting his own estate, and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrongdoer to pay for the resulting damages; and such cause of action cannot be used as a set-off."

This decision has been repeatedly affirmed.

St. L. F. S. & W. R. R. Co. v. Chenault et al., 36 Kas. 51;

Smith v. McCarthy, 39 Kas., 308;

Frankhouser v. Neally, 54 Kas., 744.

In Smith v. McCarthy, *supra*, the first and second points of the syllabus read as follows:

"Where a person takes and sells the property of another, the owner may elect to waive the tort and sue upon the implied contract for the value of the same; and whether he has so elected, and the nature of the action brought, are to be determined by the court from the pleadings."

"In determining the effect of pleadings, they should be liberally construed with a view to substantial justice between the parties; and the pleadings herein are examined and are held to state a cause of action *ex contractu*."

In this case it was held that the following allegations stated a cause of action on an implied promise:

"The plaintiff avers that on the first day of October, 1885, one Jerry McCarthy, being at that time indebted to this plaintiff in the sum of nine hundred and twenty-five dollars, made, executed and delivered to the plaintiff his certain chattel mortgage in writing, a copy of which, with all the indorsements thereon, is attached hereto, marked 'Exhibit A,' and made a part of this petition; that said chattel mortgage was forthwith, on the delivery of the same, deposited by the plaintiff in the office of the register of deeds of Atchison county, Kansas, where said chattel property was situated

and the mortgagor resided; that on or about the 28th day of October, 1885, and while said chattel mortgage was in full force and effect, of record, and unpaid, the defendant, by and through her duly authorized and appointed agent, Ryan Smith, did take the fifty head of hogs mentioned and described in 'Exhibit A,' from the possession of the plaintiff mortgagor, Jerry McCarthy, without his consent, and without the consent of this plaintiff, and did convert the same to her own use and benefit; that the value of said fifty hogs was at said time, and now is, the sum of seven dollars a head, all of said hogs being of the value of three hundred and fifty dollars; that the plaintiff has duly demanded from the defendant the said hogs and all of them, which demand was refused; and that he also demanded the value of said hogs, to wit, the sum of $350, of and from defendant, which demand has been refused; that the plaintiff has a special ownership in and to said hogs to the amount of $925, being the amount of the chattel mortgage hereto attached. Wherefore, the plaintiff prays judgment against defendant for three hundred and fifty dollars, and costs of this action."

II.

We have difficulty in understanding the position of the court below with reference to these cross-petitions (Pr. tr., p. 31, term No. 180). That each of the plaintiffs in error had a claim good as against the bank, as for money had and received, must be conceded.

Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S., 138.

That such a claim was entitled to be established as a claim which was entitled to participation in the distribution of the assets must also be conceded.

Chemical National Bank of Chicago v. Hartford Deposit Co., 161 U. S., 1.

They being claims against the bank, the plaintiffs in error could, if they chose, bring suit directly against the receiver to establish the same as claims entitled to share in all distribution.

Southern Exp. Co. v. Western N. C. R. R. Co., 99 U. S., 191;

Denton v. Baker (U. S. C. C. A., 9th Circuit), 79 Fed., 189;

Speckart et al., v. German National Bank et al., 85 Fed., 12.

While it is clear that these claims grew out of an implied contract, yet if they grew out of a tort, there is no reason existing why they should not be paid pro rata with all other claims, or be used as a set-off to the extent that they are entitled to participate in the assets in an action of this character. While, of course, the establishment of these claims could only determine their right to receive the pro rata share in the distribution, yet to that extent they should be allowed as a set-off.

Scammon v. Kimball, 92 U. S., 362;
Carr v. Hamilton, 129 U. S., 252;
Scott v. Armstrong, 146 U. S., 499, *supra;* and cases cited;
Central Appalachian Co. et al., v. Buchanan (C. C. A. 6 Cir.), 90 Fed. Rep., 454, and cases cited.

III.

There is no conceivable view that can be taken of the facts stated in the cross-complaints which would not entitle the plaintiffs in error to a judgment against the receiver for the amount of each of their several claims, or the right to set the amount of such claims off *pro tanto* against any claim of the receiver, under the Kansas statute, *supra.*

Under the provisions of section 2334, Revised Statutes, and the decisions of this court (collated in Denton v Baker, *supra*), Hood, and Lantry, each, had claims against the Missouri National Bank at the time it was placed in the hands of the receiver, growing out of the admitted fraud of the bank in selling the stock it sold to them, whether they severally were, and are, stockholders, so far as the receiver is concerned, or not; or whether they be regarded as people who having been stockholders, ceased being such from the time of the attempted rescission of their contract of purchase, or whether they be regarded as persons who purchased over issued stock, and, therefore, never were stockholders. If they never acquired any stock, owing to the fact that the transaction was *ultra vires*, or if they rescinded the contract of

purchase of the stock rightfully, they each had a several claim against the bank for the amount of money which they paid for the stock, which can be enforced in this action as a counter-claim if such claims grew out of the same transaction as did the contract which the receiver is trying to enforce against each of them. On the other hand, if the receiver has the right to recover from them the assessments ordered by the comptroller, either upon the theory that they are estopped as to him, to deny the fact that they are stockholders, or that they have waived the right to deny that they are stockholders, by reason of their laches, or that after the insolvency of the bank and the appointment of the receiver it is too late, as to the receiver, to rescind the contract of purchase, or deny the fact of their being stockholders for any reason, such right of recovery would not, in any wise, interfere with the right of action on behalf of each of the plaintiffs in error against the bank on account of its fraud, as this right existed (whether plaintiffs in error knew it or not) at the time the bank was placed in the hands of the receiver. Plaintiffs in error have the right to establish these claims against the bank, either by a judgment of the court, or by the allowance of the receiver, under the provisions of section 2334, Revised Statutes (see Denton v. Baker, *supra*, and authorities there cited), and these claims can, in such case, be used as a set-off if it be held that they do not grow out of the same transaction involved in the matters set out in the petition.

The receiver, if he can recover at all, will recover because of the contract made between the plaintiffs in error and the bank for the benefit of the creditors of the bank, by the contract of purchase of this stock from the bank. If the plaintiffs in error have the several rights to recover against the bank, it is on account of their claims that grew out of the transaction of this purchase, upon which the right of the receiver is based, and consequently, it falls within the provisions of the Kansas code relative to counter-claims.

For the convenience of the court, we have placed in the appendix

copies of those portions of the National Bank Acts applicable to the case, and also some of the sections of the English Act of 25-26 Victoria, referred to.

All of which we respectfully submit,

C. N. STERRY,
EUGENE HAGEN,
I. E. LAMBERT,
Attorneys for Plaintiffs in Error.

APPENDIX.

The following are all the sections of the Revised Statutes in reference to national banks having any application to the case under consideration:

"Sec. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

"Sec. 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

"Sec. 5234. On becoming satisfied, as specified in section fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such

bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

"Sec. 5235. The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

"Sec. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency, in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Chapter 89 of Statutes 25-26, Victoria, enacted August 7, 1862, entitled "An Act for the incorporation, regulation and winding-up of trading companies and other associations," provided for the incorporation of trading associations, etc. The 18th, 23rd, 35th, 38th, 74th and 82d sections of the Act are, for the convenience of the court, here copied and set out:

18. Upon the registration of the Memorandum of Association, and of the Articles of Association in cases where articles of association are required by this Act, or by the desire of the parties to be registered, the registrar shall certify, under his hand that the company is incorporated, and in the case of a limited company, that the company is limited. The subscribers of the Memorandum of Asso-

ciation, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up, as is hereinafter mentioned. A certificate of the incorporation of any company given by the Registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with.

23. The subscribers of the Memorandum of Association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company.

35. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in *England* or *Ireland*, by motion in any of Her Majesty's Superior Courts of Law or Equity, or by application to a Judge sitting in Chambers, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in *Scotland* by summary petition to the court of Session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may

be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal in the manner directed by "The Common Law Procedure Act, 1854," shall lie.

38. In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say):

(1) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up.

(2) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member.

(3) No past member shall be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

(4) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any unpaid on the shares in respect of which he is liable as a present or past member.

(5) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the Memorandum of Association.

(6) Nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract.

(7) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves.

74. The term "Contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up. It shall also in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.

82. Any application to the court for the winding-up of a company under this Act shall be by petition; it may be presented by the company, or by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favor of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.